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## CEMPAKA FINANCE

**v.**

## PKB-TEKNIK SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
MOHAMMAD ARIFF YUSOF J
[SUIT NO: D1-22-1971-1998]
30 APRIL 2010

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***CONTRACT:*** *Guarantee - Guarantor's liability - Plaintiff granted loans to borrower to acquire and develop land - Loan to be secured inter alia by charge over land - Compulsory acquisition of land failed - Charge over land failed to materialise - Whether guarantor discharged from liability due to change in circumstances - Whether failure to fulfil condition precedent to disbursement of loans discharged guarantor - Contracts Act 1950, ss. 33, 86, 92 & 94*

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The plaintiff granted the first defendant ('PKB-TEKNIK') a term loan of RM7.5m and a revolving credit facility of RM2m for the purpose of acquiring and developing a piece of land in Kedah ('the land'). The land was to be compulsorily acquired by the Kedah State Government and then be alienated to PKB-TEKNIK to carry out the development. The loans were secured, *inter alia*, by joint and several guarantees executed by the second and third defendants who were directors of PKB-TEKNIK. Judgment had been entered against PKB-TEKNIK and it was wound up by a third party while the third defendant guarantor had become a bankrupt. The trial in the instant action concerned the liability of the second defendant as guarantor. *Inter alia*, the second defendant's defence was premised on a loss of security. The land which was to be developed was intended to be charged to PKB-TEKNIK as security for the loans. However, the charge did not materialise as the acquisition of the land failed. The acquisition was challenged in both the High Court and the Federal Court with the latter holding it to be null and void. The second defendant submitted the plaintiff's failure to fulfil the condition precedent before release of the loans to PKB-TEKNIK discharged him from liability as a guarantor. He further submitted his liability was discharged owing to a substantial change of circumstances in connection with the loans.

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**Held (allowing the claim with costs to be taxed):**

**(1)** The plaintiff's witnesses provided cogent documentary evidence particularly with reference to how the outstanding balance and interest thereon was calculated. Evidence also showed that the letters

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of demand were sent to the guarantors. The second defendant did not rebut the plaintiff's evidence and there was no reason not to regard the plaintiff's evidence as being truthful. (paras 41 & 43)

**(2)** On the law, the second defendant's case rested on ss. 33, 86, 92 and 94 of the Contracts Act 1950. But the proposition that parties could 'contract out' of ss. 86, 92 and 94 was too well established to be questioned. (paras 35 & 39)

**(3)** After considering the evidence, the relevant law in this case, particularly the effect of the Privy Council decision in *Ooi Boon Leong v. Citibank* which allows parties to contract out by express provision from ss. 92 and 94 Contracts Act 1950, along with the very wide and exhaustive provision in the guarantees document affecting this matter, the plaintiff was found to have proven its claim as pleaded. (para 45)

**Case(s) referred to:**
*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***
*Malayan Banking Berhad v. Mawai Products Sdn Bhd (In Receivership) & 3 Ors [1995] 1 BLJ 43 HC* ***(refd)***
*Ooi Boon Leong & Ors v. Citibank NA [1984] 1 LNS 26 PC* ***(refd)***
*Suwiri Sdn Bhd v. Government of the State of Sabah [2008] 1 CLJ 123 FC* ***(refd)***
*Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC* ***(refd)***
*Wasakah Singh v. Bachan Singh [1931] 1 MC 125* ***(refd)***

**Legislation referred to:**
Bankers' Books (Evidence) Act 1949, s. 3
Contracts Act 1950, ss. 33, 86, 92, 94

*For the plaintiff - SH Au; M/s Amin-Tan & Co*
*For the 2nd defendant - CY Ng; M/s Ng & Yeong*

*Reported by Ashok Kumar*

## JUDGMENT

**Mohammad Ariff Yusof J:**

**[1]** In this action, the 1st defendant is the principal borrower of two facilities granted by the plaintiff by way of a facility letter dated 24 November 1995, comprising a term loan of RM7.5 million and a revolving credit facility of RM2.0 million. Summary judgment has been entered against the 1st defendant for the sum of RM10,547,062.18, but the 1st defendant has since been wound up by a third party. The 3rd defendant had been adjudicated a bankrupt on 9 April 2009.

**[2]** The present trial is principally concerned with the liability of the 2nd defendant as a guarantor of the said two facilities under a guarantee agreement dated 4 January 1996.

**The Plaintiff's Claim**

**[3]** According to the plaintiff's summary of its case, the terms agreed by the borrower for the term loan of RM7.5 million was for the borrower to repay the loan by monthly instalments of RM195,851 over 48 months at the agreed rate of interest of 1.75% above the plaintiff's based lending rate at monthly rests. As for the revolving credit facility of RM2.0 million, the borrower had agreed to repay it at the end of 60 months calculated from the date of first disbursement with an interest rate of 1.75% over its base lending rate at daily rests. Additionally, in the event of default of payment of any of the monthly instalments, the plaintiff is allowed to impose an additional rate of interest of 1% at daily rests.

**[4]** Under the guarantee agreement of 4 January 1996 executed between the 2nd and 3rd defendants and the plaintiff, the 2nd and 3rd defendants, in consideration of the facilities being accorded to the 1st defendant, expressly agreed unconditionally and irrevocably to guarantee the payment on demand of any sum payable by the 1st defendant upon default by way of an indemnity arising from such default.

**[5]** The 1st defendant defaulted, and as such the 2nd and 3rd defendants are liable severally and jointly to indemnify the indebtedness, the particulars of which are elaborated as follows:

| | |
|---|---|
| Term Loan | |
| Loan Disbursed | RM 7,500,000.00 |
| Add: Interest | RM 2,200,563.00 |
| Late Interest | RM 13,403.79 |
| | RM 9,713,966.82 |
| Subtract: Payment received | RM 1,488,019.00 |
| Outstanding balance due as at 16.4.1998 | RM 8,225,947.36 |
| Revolving Term Loan | |
| Full disbursement | RM 2,000,000.00 |
| Add: Interest Chargeable | RM 389,666.16 |
| Late Payment Interest | RM 1,418.77 |
| Other Charges | RM 21,193.66 |
| | RM 2,412,278.59 |

| | |
|---|---|
| Subtract: Payment Received | RM 91,163.66 |
| Outstanding balance due as at 16.4.1998 | RM 2,321,114.82 |
| Total amount outstanding (Term Loan + Revolving Term Loan) | RM10,547,062.18 |

**[6]** The prayers for relief as disclosed in the statement of claim are:

(a) Sum of RM10,547,062.18 as at 16 April 1998;

(b) Interest on the sum of RM8,225,947.36 (term loan) and the rate of 16.35% per annum and on the sum of RM2,321,114.82 (revolving term loan) at the rate of 16.10% per annum, both commencing from 17 April 1998 until the date of full settlement;

(c) Late payment/penalty interest on overdue instalments at the rate of 1% per annum as prescribed from 17 April 1998 until date of full settlement; and

(d) Cost.

**The 2nd Defendant's Case**

**[7]** As can be seen from the summary of the 2nd defendant's case, whilst the 1st defendant is acknowledged as the borrower under the loan agreement dated 4 January 2009, this loan is said to be for the purpose of developing a piece of land held under Geran No. 20487, Lot No. 284 Mukim Sungai Petani, Daerah Kuala Muda, Kedah. This piece of land was supposed to have been acquired by the Kedah State Government and subsequently transferred to the 1st defendant for the purpose of development, and in this right a charge in escrow in respect of the land was executed as a charge in favour of the plaintiff. The acquisition failed and as such no charge over the land as security materialised. It is the position of the 2nd defendant that the claim against him is premature since the plaintiff had not taken steps to realise the charge as provided in the loan agreement. Further, the plaintiff had acted inconsistently with his obligations as lender to the 1st defendant, as well as its obligations to the 2nd defendant and the 3rd defendant, so as to cause prejudice to the 2nd and 3rd defendants. As such the liability of the 2nd and 3rd defendants has been discharged by the plaintiff's action. Additionally, the defence of the 2nd defendant has been prejudiced arising from the failure and neglect on the plaintiff's part to proceed with the action expeditiously. The obligation of the 2nd defendant as guarantor has also been discharged, so it is alleged, owing to change of circumstances in a substantial manner in connection with

the subject matter of the loan. The notice of demand to the 2nd defendant is also null and void. The plaintiff has also failed and/or been negligent in not fulfilling a condition precedent before releasing the loan to the 1st defendant. The plaintiff, it is said, has prejudiced the 2nd defendant in so failing or neglecting to take action to ensure that the condition precedent was satisfied before releasing the loan. Generally, the plaintiff has an obligation to the 2nd defendant to act with due care before deciding to release the loan to the 1st defendant.

**Issues To Be Tried**

*The Plaintiff's Issues To Be Tried*

**[8]** The plaintiff files its own issues to be tried, consisting of the following broad issues:

(a) Whether the demand for payment by the plaintiff on the 2nd defendant is premature;

(b) Whether the interest imposed by the plaintiff is unlawful, excessive and not agreed to by the 2nd defendant;

(c) Whether the letters of demand by the plaintiff dated 30 April 1998 and 12 May 1998 which were sent to the 2nd defendant, complied with the requirements of cl. 7.04 of the guarantee agreement dated 4 January 1996;

(d) Whether the 2nd defendant is in breach of the guarantee agreement;

(e) Whether the 2nd defendant is estopped from challenging the amount claimed by the plaintiff in this action on the ground of the 2nd defendant's failure to satisfy the requirements in the letters of demand dated 30 April 1990 and 12 May 1990.

**The 2nd Defendant's Issues To Be Tried**

**[9]** The 2nd defendant for his part states ten issues as part of his issues to be tried. In the course of submission however these ten issues were reduced to 4, (as specified in the defendant's skeletal submission under the heading "issues to be determined"), reading:

(a) Whether the plaintiff had breached its duties as lender:

(i) When it failed, refused and/or neglected to fulfill the conditions precedent in the facility agreement; and

(ii) When it allowed for a drawdown in a contingent contract.

(b) Whether the Acts and/or omission by the plaintiff has discharged the 2nd defendant from his liability. A

(c) Whether the 2nd defendant's obligations to the plaintiff is discharged by change of circumstances.

(d) Whether the plaintiff's failure to prosecute the claim timeously had caused prejudice to the 2nd defendant that cannot be compensated by costs. B

**[10]** From the issues to be tried as stated by the respective parties, it can be seen that the plaintiff advances its case as a straightforward case of default of two facilities that had been completely drawn down consistent with the provisions in the loan agreement. Arising from the default by the borrower under the terms of the agreement, the plaintiff as borrower is entitled to impose the interest and the rates specified together with a default/late interest consistent with provisions in the loan agreement. The calculation of the total outstanding balance and interest thereon as prayed for in the statement of claim as payable by the borrower and the guarantors, is supported by express provisions of the agreement and the necessary actions taken by the plaintiff. Similarly, the demand made and imposition of liability on the defendants, on the facts of this particular case the 2nd defendant, is consistent with the rights of a plaintiff as lender and the position of the guarantors under the guarantee agreement. C D E

**[11]** The 2nd defendant, on the other hand, advances his case on three primary grounds, namely breach of the plaintiff's duty as lender to the borrower in relation to a condition precedent of the loan, which breach discharges the 2nd defendant as guarantor from his liability; change of circumstances resulting in the discharge of the 2nd defendant from his liability as guarantor; and thirdly, the failure by the plaintiff to prosecute its claim timeously and causing prejudice to the 2nd defendant that cannot be compensated by costs. F G

**[12]** It would appear that the other issues related to no effective demand being made on the guarantors and wrongful imposition of the interest now being claimed, have not been pursued vigorously.

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**The Material Background Facts**

**[13]** The 1st defendant company was formed as a joint venture between Permodalan Kedah Berhad and a company named Berisi Teknik Sendirian Berhad for the purpose of developing the 138.38 acres of Lot 284, Geran 20487, Mukim Sungai Petani, Daerah Kuala Muda. This I

piece of land was intended to be compulsorily acquired by the Kedah State Government and then subsequently alienated to the 1st defendant. Part of the term loan of RM7.3 million was intended for payment of the compensation for the compulsory acquisition. That worked out as RM3,459,500, which was paid to the Kedah State Authority for payment to the landowner in question.

**[14]** The compulsory acquisition was challenged in court twice successfully in the High Court Kuala Lumpur, and on appeal, the High Court decision was affirmed by the Federal Court in 2001. The upshot of it was the intended compulsory acquisition was adjudged to be null and void.

**[15]** Pending the disposal of the court proceedings, the sum of RM3,459,500 was paid into the High Court, Alor Setar.

**[16]** Evidence was led on this during the trial, but the 2nd defendant could not confirm the status of this sum paid into court. See the questions and answers 19 - 25 during cross-examination of the 2nd defendant ("DW1").

*The Terms And Conditions And Purpose Of The Loan Facilities*

**[17]** By letter dated 24 November 1995, the plaintiff approved the 1st defendant's application for the two facilities mentioned earlier subject to express terms and conditions. The purpose of the term loan of RM7.5 million was expressly stated as:

> For the financing of the compensation payable to the said authorities of Kedah Darul Aman for the alienation of a piece of development freehold land measuring approximately 48.16 ha (419 acres) identified as Lot No. 284, Geran 20487, Mukim of Sungai Petani, District of Kuala Muda, State of Kedah Darul Aman (hereinafter referred to as the "subject property") as well as for the provision of initial working capital up to a maximum of RM 7.50 million.

**[18]** The security for the term loan facility consisted of the following:

(a) A first legal charge under the National Land Code 1965 over the "subject property" which, to quote the exact words in para. 5 of the facility letter, "was fully appraised by Messrs Raine and Horne Zaki and Partners *vide* the report dated 16 August 1995 to have the following values:

| Open Market Value | Forced Sale Value |
|---|---|
| RM 37,000,000 | RM 26,000,000 |

**[19]** Pending the issues of title, the term loan facility of RM7.5 million was to be secured by a debenture on all present and future assets of the 1st defendant in favour of the plaintiff, a power of attorney over the "subject property" in favour of the plaintiff, a charge in escrow over the subject property in the plaintiff's favour, an irrevocable letter of instruction from the 1st defendant to the land office instructing the land office to hand over the title of the subject property to the plaintiff's solicitors upon issuance of the same, a fixed deposit of RM1,000,000 to be placed under lien with the plaintiff with the right of set-off against any amounts owing by the 1st defendant to the plaintiff, and the joint and several guarantees from the 2nd and 3rd defendants.

**[20]** The 2nd and 3rd defendants were at all material times the directors of the borrower company.

*Conditions Precedent To Drawdown*

**[21]** Given the importance of the matter relating to "conditions precedent", as strongly advanced by the 2nd defendant, it is necessary to quote the entire terms and conditions in this regard in full (cl. 8 of the facility letter):

> The obligation of CFB [the Lender] to make available the facility for disbursement shall be conditional upon:-
>
> 8.1 PKBT [the Borrower] having complied with all the terms and conditions stipulated herein to the satisfaction of CFB;
>
> 8.2 Acceptance of this letter of offer.
>
> 8.3 All relevant security documents or other documentation stipulated herein have been duly executed, stamped and/or registered with such relevant registries;
>
> 8.4 CFB shall have received in form and substance satisfactorily to CFB copies of the following documents certified as being true and correct:
>
> (a) PKBT's board resolution authorising the application and acceptance of this facility on the terms and conditions stipulated herein and duly empowering the person or persons on behalf of PKBT for the execution of the relevant security documents;
>
> (b) …
>
> 8.5 Physical inspection of the Subject Property by an authorized officer of CFB. The inspection fee is to be borne by PKBT.
>
> …

A 8.8 a search shall have been made by CFB's solicitors with the relevant land Registry on the subject property and the said search report in form and substance acceptable to CFB shall have been furnished to CFB;

8.9 CFB's solicitors shall have furnished to CFB their confirmation
B that the security documents have been duly presented for registration and that this facility may be made available for drawdown; ...

**[22]** Equally important are the terms and conditions relating to disbursement, namely cl. 9 which in turn reads:

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9.1 **Upon completion of all security documentation and conditions precedent to drawdown**, the facility shall be disbursed to our solicitors for the onward transmission as required in the joint-venture/shareholders agreement made between PTB and Berisi Teknik Sdn Bhd and upon the receipt
D of the required drawdown notices from PKBT to meet its initial working capital requirements.

Tranche 1

Payment of RM 3.50 million to the relevant state authority being
E the compensation payable in acquiring the subject property.

Other Tranches

The balance of RM 4.0 million is available to PKBT to finance the initial costs cum working capital for PKBT to embark on the
F subject development.

9.2 At least five working days prior written notice from the intended date of drawdown must be given to CFB ...

9.3 CFB reserves the right, at its absolute discretion, not to make any advance of monies, if such would at any time of advance,
G render CFB in breach of default of any law, directive or regulation in force at the time of PKBT's request. (emphasis added)

**[23]** In relation to the revolving term loan of RM2.2 million, the
H purpose is stated as "to finance the working capital requirements and infrastructure costs of one piece of development freehold land measuring approximately 48.16 ha (419 acres) identified as Lot No. 284, Grant 20481, Mukim of Sungai Petani, District of Kuala Muda, State of Kedah (hereinafter referred to as "subject property") into a proposed mixed commercial development."

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**[24]** The interest chargeable is expressly stated as 1.5% above the CFB's base lending rate (presently 9.80% per annum) ie, 11.30% per annum, on daily rests basis.

**[25]** The security for the second facility is somewhat similar to the security provided for the first facility, namely the first legal charge under the National Land Code on the subject property, and duly appraised with the same open market value and forced sale value, a fixed deposit of RM1.0 million to be placed under lien with CFB, the right of set off against any amounts owing by PKBT to CFB, joint and several guarantees of the 2nd and 3rd defendants.

**[26]** As for conditions precedent to drawdown, cl. 8 of the second facility letter specifies:

> The obligation of CFB to make available the revolving term loan of RM 2.0 million for disbursement shall be conditional upon:
>
> 8.1 PKBT having complied with all the terms and conditions stipulated herein to the satisfaction of CFB;
>
> 8.2 Upon issuance of a title for the subject property and the presentation of a First Legal Charge under the National Land Code, 1965 in favour of CFB.

**[27]** Clause 9 states the conditions for disbursement, and these are:

> 9.1 Completion and registration of all security documentation and other proceeding is to the absolute satisfaction of CFB and the confirmation by CFB's solicitors that it is in order for the loan to be released.
>
> 9.2 The facility or part thereof shall be disbursed to PKBT upon receipt of drawdown notices from PKBT;
>
> 9.3 All drawings shall be in integral multiples of RM 50,000.00 subject to a minimum tranche of RM 100,000.00 or such other amounts as shall be mutually agreed between CFB and PKBT.
>
> 9.4 CFB reserves the right, at its absolute discretion, not to make any advance of monies, if such would at any time of advance, render CFB in breach or default of any law, directive or regulation in force.
>
> 9.5 At least five working days prior written notice of the intended date of drawdown must be given to CFB.
>
> 9.6 Any drawings repaid is eligible for redrawing, subject to compliance with conditions (9.3), (9.4) and (9.5) hereinbefore stated.

**[28]** These provisions are repeated in the loan agreement executed subsequently and dated 4 January 1996. See cls. 4, 6, 7, 8, 10, 11, 12. The conditions precedent to drawdown are in cl. 11, in which para. (r) of para. (1) stipulates:

> (r) the Lender having received satisfactory evidence that the said Land has been or will be acquired by the State Government of Kedah Darul Aman and thereafter realienated to PKB or the Borrower(s) for the purpose of development of the Said Project on the Said land.

*The Guarantee Terms And Conditions*

**[29]** The guarantee agreement dated 4 January 1996 follows the pattern of a tightly worded banking document which is typical of guarantee documents used by financial institutions nowadays. Clause 3.01(1)(i) provides that the guarantors unconditionally and irrevocably guarantees that if the borrower does not pay any sum payable to the lender, the guarantors will on demand by the lender pay that sum owing together with interest and any other sums payable by the borrower by way of indemnity arising from the default by the borrower. Section 3.01(2) provides the usual principal debtor clause and a host of "without limitation" provisions reading:

> ...
>
> (vii) the enforcement or absence of enforcement of any of the Security or any security or order guarantee or indemnity;
>
> (x) the illegality, invalidity or unenforceability of any defect in any proviso of any of the Security documents or this Agreement or any of the Borrower(s) obligations under this Facility or the Borrower(s) obligations under any of the Security Documents.

**[30]** Clause 3.02, a "continuing security" clause provides:

> The Guarantor(s)'s obligations under this Agreement are joint and several and will remain in full force and effect by way of continuing security until no sum remains to be lent or remains payable under the Facility and the Security Documents.

**[31]** Clause 4.01, an "additional security" clause provides:

> This Agreement shall be additional to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Lender for all or any part of the moneys hereby guaranteed ...

**[32]** Clause 3.01(1)(ii)(a) addresses the issue of conditions precedent and provides:

> The said Guarantors hereby expressly agreed that the Guarantee Agreement herein is executed as follows:
>
> (a) without any conditions precedent whatsoever save that expressly provided herein.

## The Relevant Law And Submissions Of The Parties

*The Plaintiff's Case*

**[33]** The plaintiff advances a straightforward main line of argument based on express terms and conditions of the guarantee agreement, supported by the factual assertion that two letters of demand had been sent to the 2nd defendant by letters dated 30 April 1998 and 12 May 1998 respectively. Reliance was placed on the conclusive evidence clause (cl. 7.03) and the leading authority of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, to the effect that a certificate of indebtedness showing the amount of indebtedness is valid and binding save for fraud and manifest error on the face of the certificate.

**[34]** The 2nd defendant's assertion in relation to loss of security and change of circumstances was rebutted by arguing that a guarantor cannot rely on provisions in the loan agreement to which he is not a party. Citing *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123 (Federal Court), the 2nd defendant argued "a person who is not a party to a contract cannot take advantage of provisions of the contract" and that the doctrine of privy of contract, as a general rule, cannot confer rights or impose obligations of strangers to it.

*The 2nd Defendant's Case*

**[35]** On the law, the 2nd defendant's case rests on ss. 33, 86, 92 and 94 of the Contracts Act 1950. These provisions state the statutory law in the following terms:

> **Section 33: Enforcement of contracts contingent on an event happening:**
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.

**Section 86: Discharge of surety by variance in terms of contract.**

Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

**Section 92: Discharge of surety by creditor's act or omission impairing surety's eventual remedy.**

If the creditor does any Act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

**Section 94: Surety's right to benefit of creditor's securities.**

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

**[36]** The 2nd defendant's argument would then appear as proceeding from the basis of the existence of some duty of care on the part of the Lender towards the guarantor. *Paget's Law of Banking* (13th edn) is cited in support:

> Unless the guarantee otherwise provides or the Guarantor consents, the guarantee will be discharged where the Creditor, without the prior agreement of the Guarantor:
>
> …
>
> (3) Releases security that he holds for the guaranteed debt;
>
> (5) Breaches a term of his contract with the Principal Debtor … which amount to a substantial departure from a term of the principal contract 'embodied' in the guarantee, either expressly or by implication;
>
> (6) Acts in bad faith towards the Guarantor or connives at the default of the Principal Debtor.

**[37]** It is noteworthy that even Paget contemplates a non-application of the general rules where "the guarantee otherwise provides or the guarantor consents."

**[38]** This commentary therefore fits within the analysis stated in the leading case of *Ooi Boon Leong & Ors v. Citibank NA* [1984] 1 LNS 26, as applied in *Malayan Banking Berhad v. Mawai Products Sdn Bhd (In Receivership) & 3 Ors* [1995] 1 BLJ 43. Lord Brightman in an oft-quoted passage in *Ooi Boon Leong* stated:

> The argument founded on a comparison between (i) sections 86, 92 and 94 and (ii) certain other sections of the Act which are expressed to be "subject to a contrary intention" or the like also fails. Random recognition in certain sections of the Act of the fundamental principle that contracting parties are at liberty to express their intentions their contracts as they please is quite insufficient to support the contrary proposition that the absence of such recognition in another section implies the absence of freedom to contract ...

**[39]** Hence, the proposition that parties are able to "contract out" of ss. 86, 92 and 94 is too well-established to be questioned.

**[40]** The decision in this present case therefore depends on both a consideration of the evidence led, set against the express provisions in the facility letter, loan agreement and the guarantee, in order to conclude whether the express provisions are wide enough to answer the grounds raised by the 2nd defendant as well as to determine whether there exists any element of consent on the part of the guarantor.

**Evaluation Of The Evidence**

**[41]** The plaintiff called two witnesses, PW1 (Tan Wee Hong) and PW2 (Thu Ah Seng) who provided cogent documentary evidence, particularly with reference to how all the outstanding balance and interest thereon was calculated. PW1 in particular showed how the calculations was arrived at by referring to the original ledger documents (exhs. P1 and P2). Evidence was also led that the two letters of demand were in fact sent to the guarantors, including the 2nd defendant. On the evidence, these were not challenged by the 2nd defendant who himself gave evidence as DW1. In this regard, plaintiff's counsel is correct to quote the principle in *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 which stated that in such a situation, all the evidence presented must be presumed to be true. To quote *Wasakah Singh*:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove its case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove its case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence must be presumed to be true.

**[42]** This case has been cited with approval recently by the Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, where no evidence was called for the respondent, and the Federal Court held:

> In our judgment, two consequences inevitably followed when the 1st Respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the Appellant ought to be presumed to be true ...
>
> The second consequence is that the court ought to have drawn an adverse inference against the 1st Respondent ... Where, as here, the 1st Respondent being a party to the action provides no reasons as to why she did not care to give reasons the court will draw an adverse inference ... (at pp. 398-399)

**[43]** The 2nd defendant has not rebutted the plaintiff's evidence on this, and I do not find any reason not to regard the evidence given by PW1 and PW2 as being truthful, particularly in light of the presumption in the Bankers' Books (Evidence) Act 1949, s. 3, which provides that a copy of any entry in banker's books shall in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.

**[44]** I also find on the evidence, the case for the defence, as disclosed by the testimony of DW 1, is essentially premised on the arguments of change of circumstances and loss of security. DW1 expressly admitted in his evidence that the loans were disbursed fully and that the 1st defendant company obtained benefit from them. His evidence on the status of the RM3.2 million paid into the Alor Setar High Court (being the premium compensation sum paid for the subject property) is particularly unhelpful and guarded, bearing in mind that at all material times he was a director of the 1st defendant company and was one of the directors authorised to execute the loan and security documents. I quote the relevant parts of his testimony below:

> Testimony during cross-examination
>
> 14.Q : I suggest to you that at all material point of time neither the Borrower nor the Guarantor objected to the drawdown of the full term loan and revolving term loan?
>
> A : No. Not objected.
>
> 15.Q : Is it a situation where the Plaintiff had refused drawdown of the term loan and revolving the term loan to the Borrower?
>
> A : It is too long, I am not sure.

16.Q : Is it a situation where the Borrower had enjoyed use of the term loan and revolving term loan that were granted by the Plaintiff?

A : Yes.

17.Q : As a Director of the Borrower, would you agree with me that the said land was earmarked for acquisition by the Kedah State Government for the benefit of the Borrower who will provide compensation to the owners of the said land?

A : Yes.

18.Q : Would you agree with me that for financing the acquisition and development of the said land, the Borrower obtained loan facilities from the Plaintiff?

A : Yes.

19.Q : Do you agree with me that a sum of RM3,459,500.00 from the term loan had been utilized by the Borrower on the 8.1.1996 and deposited with the High Court of Alor Setar?

A : Yes.

20.Q : What was the purpose of RM3,459.500.00?

A : To pay for the acquisition cost.

21.Q : As a Director of the Borrower, at the juncture of the release of the RM3,459.500.00 has the Plaintiff received satisfactory evidence that the said land has been or will be acquired by the State Government of Kedah Darul Aman and thereafter realienated to the Borrower for the purpose of the development of the said project on the said land?

A : Yes.

22.Q : Are you aware that in year 2001, the Federal Court had ruled the acquisition of the said land was unsuccessful and the intended acquisition exercise was randed null and void?

A : Yes.

23.Q : Under such circumstances, would you agree that it would only prudent for the sum of RM3,459.500.00 that was deposited in the High Court of Alor Setar to be return to the Borrower?

A : Yes.

24.Q : Presently, where is this sum of RM3,459.500.00?

A : The Borrower does not know.

25.Q : I put it to you that no steps were taken by the Borrower to retrieve the sum of RM3,459.500.00 from the High Court of Alor Setar?

A : It is really 10 years case, I cannot recall.

...

33.Q : Please refer to your answer to Q & A No. 21 of WSDW1. Look at Clause 36 at page 52 and 53 of Bundle A1. Does Clause 36 provide changes in circumstances shall discharge the contractual obligation and or duties of a Guarantor under the Guarantee Agreement?

A : Yes.

34.Q : I suggest to you that Clause 36 does not provide changes in circumstances shall discharge the contractual obligation and or duties of a Guarantor under the Guarantee Agreement?

A : I cannot understand the Clause.

35.Q : Does Clause 36 provide where a first party charge in favour of the Plaintiff can no longer be carried out such circumstances tantamount to changes in circumstances?

A : Yes.

36.Q : I put it to you that Clause 36 does not provide where a first party charge in favour of the Plaintiff can no longer be carried out such circumstances tantamount to changes in circumstances?

A : Yes.

...

39.Q : Please look at page 172 para 5.7. Ensuing to the outcome and the second enquiry held on 23.8.1997, would you agree that on balance of probability the Plaintiff received satisfactory evidence that the said land will be acquired by the State Government of Kedah Darul Aman and thereafter realienated to the Borrower for the purpose of the development of the said project on the said land?

A : Yes.

...

Testimony during Re-examination

4.Q : Please refer to question no. 21 during cross examination where you were asked "As a Director of the Borrower, at the juncture of the release of the RM3,459.500.00 has the Plaintiff received satisfactory evidence that the said land has been or will be acquired by the State Government of Kedah Darul Aman and thereafter realienated to the Borrower for the purpose of the development of the said project on the said land". As a Director, would you know whether the Plaintiff had the satisfactory evidence that the land has been or will be acquired by the State Government and thereafter realienated to the 1st Defendant?

A : I don't know.

## Conclusion

**[45]** After giving full consideration to the evidence, both documentary and testimonial, and considering the relevant law in this case, particularly the effect of the Privy Council decision in *Ooi Boon Leong v. Citibank* which allows parties to contract out by express provisions from ss. 92 and 94 of the Contracts Act, and bearing in mind the very wide and exhaustive provisions in the guarantee document affecting this matter, I find the plaintiff has proven its claim as pleaded. Judgment is therefore to be recorded for the plaintiff against the 2nd defendant as claimed in para. 12(a), (b), (b.1), with the interest claimed in (b) and (b.1) to be calculated at the respective prescribed rates at monthly and daily rests respectively from 17 April 1998 until date of judgment, and at 8% per annum thereafter from date of judgment until full settlement, and (c) at the rate of 1% per annum as late interest from 17 April 1998 until full settlement, with costs to be taxed.